No. 90-1741

FILED
JUN 3 1991
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK AG

and

DR. BRUNO M. KÜBLER, as Trustee in Bankruptcy for Westaufbau GmbH and Westaufbau Grundbesitzanlagen GmbH & Company KG,

Petitioners,

v.

DR. KLAUS HUBERT GÖRG, as Trustee in Bankruptcy for the Estate of Heinz Günter Kaussen, Pursuant to the laws of the Federal Republic of Germany,

and

EDGARDO L. PARUNGAO, as Administrator CTA of the Georgia Probate Estate of Heinz Günter Kaussen,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Georgia

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RESPONDENT PARUNGAO'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether payment of substantially all claims other than Petitioners' renders moot constitutional contentions regarding equal protection.

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RESPONDENT PARUNGAO'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

O.C.G.A. § 5-6-10. Transmittal of remittitur to lower court generally.

> "The decision of the appellate court and any direction awarded in the case shall be certified by the clerk to the court below, under the seal of the court.

> The decision and direction shall be respected and carried into full effect in good faith by the court below. The remittitur shall contain nothing more, except the costs paid in the appellate court."

STATEMENT OF THE CASE

Events Subsequent to the Decision

Following the Georgia Supreme Court decision affirming, without opinion, the Respondents' Motions for Summary Judgment, Petitioners did not seek to stay the remittiturs.[1] In due course on February 12, 1991, the remittiturs from the Georgia Supreme Court were made the order of the trial court. (See Appendix, pp. 1a and 2a.) Subsequently, Petitioners have not sought any stay in the trial court nor in this Court.

During the intervening three and a half months, Parungao has implemented the final, unstayed judgment directing him to pay all valid claims in amounts allowed by him except those of Petitioners and the two other German banks which did not oppose or appeal the grant of summary judgment. Of a total of 241 claims filed, excluding the Petitioners', 230 have been paid. The remaining eleven claims will be settled and paid imminently.

REASONS FOR DENYING THE WRIT

I. MOOTNESS RENDERS NON-JUSTICIABLE PETITIONERS' CLAIMS

The summary judgment granted Respondents to which Petitioners object directs payments of all valid claims ex-

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[1] Rule 61 of the Georgia Supreme Court Rules provides:

> "Any party desiring to have the remittitur stayed in this court in order to appeal or seek a writ of certiorari in the United States Supreme Court shall file in this court motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for rehearing, or if no motion for rehearing is filed, within the time allowed for the filing of same."

cept those of Petitioners and two other non-objecting German banks.[2] The thrust of Petitioner's constitutional claim to denial of equal protection is directed to the payment of domestic claims in advance of those of Petitioners. This argument is now moot.

When the Petitioners failed to inform the Georgia Supreme Court of their intention to seek certiorari and request it to withhold its remittiturs, as provided by Rule 61 of the rules of that Court, the remittiturs were transmitted to the trial court and made its Order on February 12, 1991. (See Appendix, pp. 1a and 2a.) Georgia law directs that the Appellate decision ". . . shall be respected and carried into full effect in good faith . . . ." O.C.G.A. § 5-6-10.

During the intervening three and a half months, Parungao has followed the order directing him, first, to pay in full all valid claims filed with him except those of Petitioners. Of 241 of such claims filed, 230 have been paid.

Even if Petitioners' constitutional claim for equal protection had been properly raised, it is moot. Petitioners stood idly by while Parungao discharged his fiduciary duty as directed by the trial court.

There is no justiciable controversy before this Court applicable to Petitioners' equal protection claim. In *Burke v. Barnes*, 579 U.S. 361, 363 (1987), this Court held:

> Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides a case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.

The only aspect of the summary judgment order remaining to be discharged is the direction to Parungao to deliver the net proceeds to Dr. Gorg for determination under German law of the claims of all German creditors,

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[2] See Appendix C, at Page 18a, Petition for Writ of Certiorari.

including Petitioners'. That direction raises no federal case for review by this Court.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THE EXISTENCE OF A SUBSTANTIAL FEDERAL QUESTION THAT WAS PROPERLY RAISED, PRESENTED AND PURSUED IN THE STATE COURTS BELOW

Petitioner Parungao adopts and endorses the argument set forth in the brief filed by Respondent Dr. Gorg.

III. THE AFFIRMING ORDER AND THE JUDGMENT ARE BASED UPON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS, MAKING REVIEW BY THIS COURT UNNECESSARY AND INAPPROPRIATE

Petitioner Parungao adopts and endorses the argument set forth in the brief filed by Respondent Dr. Gorg.

CONCLUSION

The direction of the Georgia court to which Petitioners attempt to raise constitutional claims having been obeyed by Parungao, there is no justiciable controversy involving a federal question presented by the Petition for Certiorari. Accordingly, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF GEORGIA
Atlanta, January 10, 1991

The honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1634

BRUNO M. KUBLER *et al.*

v.

EDGARDO PARUNGAO *et al.*

This case came before this Court upon an appeal from the Superior Court of Fulton County and, after argument had, it is considered and adjudged that the judgment of the Court below

Affirmed without opinion.

All justices concur.

It is ordered that the judgment of the Supreme Court of Georgia in the within stated case be and the same is hereby made the judgment of this Court.

This 12th day of February, 1991.

/s/ Joel J. Fryer
Judge, Fulton Superior Court
A.J.C.

SUPREME COURT OF GEORGIA
Atlanta, January 10, 1991

The honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S90A1633

BAYERISCHE HYPOTHEKEN-UND WECHSEL-BANK *et al.*

v.

EDGARDO PARUNGAO *et al.*

This case came before this Court upon an appeal from the Superior Court of Fulton County and, after argument had, it is considered and adjudged that the judgment of the Court below

Affirmed without opinion.

All justices concur.

It is ordered that the judgment of the Supreme Court of Georgia in the within stated case be and the same is hereby made the judgment of this Court.

This 12th day of February, 1991.

/s/ Joel J. Fryer
Judge, Fulton Superior Court
A.J.C.